IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

W.P. No. 212 of 2003 (S/B)

Madhu Sudan Kholia ……... Petitioner

Versus

State of U.P. & others ……. Respondents

Mr. Manoj Tiwari, learned counsel for the petitioner.
Mr. B.S. Verma, learned Standing Counsel (U.P. Govt.).

Hon. P.C. Verma, A.C.J.
Hon. M.M. Ghildiyal, J.

This writ petition has been filed by the petitioenr challenging the judgment and order dated 16.10.1997 contained in Annexure 5 to the writ petition passed by the State Public Service Tribunal in claim petition No. 1863 of 95 to the extent to which the Tribunal has denied the pension to the petitioner for the post of Office Superintendent.

The petitioner was appointed as Clerk in Nagar Palika, Nainital on 28.6.1948 and was promoted as Head Clerk on 2.12.1971. He continued to work as Head Clerk. Thereafter, the Incharge Officer, Nagar Palika, Nainital allowed the petitioner to discharge the functions of the Officer Superintendent and gave him the charge of that office on 17.11.1979. The officiation of the petitioner on the post of Office Superintendent was subject to the approval of Director, Local Bodies. The petitioner took charge of the post of Office Superintendent on 20.11.1979. The petitioner was also ordered for payment of salary in the pay scale payable to the Office Superintendent by the Incharge, Nagar Palika, Nainital and the petitioner was paid the salary of the post of Office Superintendent till his superannuation. The petitioner superannuated on 31.3.1989. Thus, the petitioner discharged his duties as Officer Superintendent from 17.11.1979 to 31.3.1989 for about 10 years.

Thereafter, the petitioner was again given appointment for one year on the post of Office Superintendent. During the course of his re-employment, the State Government took a policy decision to cancel

all re-appointments in the State and therefore, the petitioner's re-appointment was also cancelled vide order dated 12.12.1989.

The post of Office Superintendent is a post under the U.P. Palika (Centralised) Services Rules, 1966. The appointing authority of the post is the State Government and the post is within the purview of Public Service commission. The petitioner was never promoted by the state Government after consulting with the Public Service Commission on the post of Office Superintendent. The petitioner was acting as Office Superintendent under the orders of the Incharge, Nagar Palika, Nainital. The post of Head Clerk on which the petitioner was substantively promoted, subsequently, was brought under the Centralised Service Rules in the year 1983. The State Government, when found that the petitioner was never promoted substantively on the post of Office Superintendent and that he was promoted only by the Incharge, Nagar Palika, issued a recovery certificate for the recovery of the excess amount drawn by the petitioner by way of salary on the post of Office Superintendent. Thereafter, the petitioenr filed a claim petition before the State Public Service Tribunal seeking three reliefs, which are as follows:

1. That his promotion order should be declared to be a regular one.
2. That he should be sanctioned pension on the basis of last pay drawn by him on the post of Office Superintendent.
3. To quash the recovery certificate issued by the State Government for the recovery of the excess amount drawn by him.

The State Public Service Tribunal has held that the petitioner was never promoted substantively on the post of Office Superintendent by the State Government, who is the appointing authority. Therefore, the promotion of the petitioenr on the post of Office Superintendent cannot be regularised. However, the Public Service Tribunal, relying on the two judgments of the Supreme Court quoted in the judgment, partly allowed the claim petition and quashed the recovery order issued by the State Government as it was issued

without affording any opportunity to the petitioner. The State Government has not challenged this part of the order of the State Public service Tribunal. But the Public Service Tribunal has rejected the other reliefs which indicate that the Tribunal has refused to declare the promotion of the petitioner on the post of Office Superintendent to be a regular one and also refused the pensionary benefits.

Learned counsel for the petitioenr has challenged the order of the Public Service Tribunal so far as it related to the denial of pension to be paid to the petitioner on the basis of last pay drawn on the post of Office Superintendent.

Learned counsel for the petitioenr invited our attention to the U.P. Palika (Centralised Services Retirement) Benefits Rules, 1981 and submitted on the basis of the definition given of 'average emoluments' on the basis of which, the pension is fixed, which is defined under clause 2 of Section 2, which reads as under:

> "2(2) "**Average Emoluments**" means monthly average of the emoluments due to the concerned officer during the last ten months immediately preceding the date on which the concerned officer is to retire:
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> Provided that –
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> (i) If, during the last ten months of service, an officer has been absent from duty on leave without allowance, or suspended under such circumstances that the period of suspension does not count as service the periods so passed should be disregarded and an equal period immediately preceding the last ten months should be included; and
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> (ii) If during the last ten months of service, an officer has been absent form duty on leave without allowances, or having been suspended, has been reinstated without forfeiture of service, his emoluments, for the purpose of ascertaining the average, should be taken at what they would have been if he had not been absent from duty or suspended.

Explanation – the expression “Allowance” in this clause includes pay as well as all such allowances as are admissible to an officer.”

Learned counsel for the petitioenr submitted that on the basis of the aforesaid definition, even if the petitioner’s promotion is not regularised, the petitioner is entitled for payment of pension on the basis of average emoluments, which is to be calculated according to clause 2 of Section 2 of U.P. Palika (Centralised Services Retirement) Benefits Rules, 1981 and learned counsel for the petitioenr submitted that the average emoluments of the petitioner should be calculated on the basis of the last pay drawn on the post of Office Superintendent.

The argument of the learned counsel for the petitioenr is misconceived. As noticed above, the petitioner was not promoted by the state Government substantively on the post of Office Superintendent according to the Rules. Therefore, the petitioenr did not become the member of the Centralised Service on the post of Office Superintendent. He became the member of Centralised Service on the post of Head Clerk, when the post was brought within the purview of the Centralised Services in 1983. Section 3 of the U.P. Palika (Centralised Services Retirement) Benefits Rules, 1981 specifically provides that these rules shall apply compulsorily to all those officers who are appointed on or after July 1996 under clause 1 of Rule 2 of the U.P. Palika (Centralised) Services Rules, 1966. Petitioner became the member of Centralised Services in the year 1983 on the post of Head Clerk. Therefore, these rules will apply in case of the petitioenr for payment of pension on the post of Head Clerk and it will not apply to the petitioenr on the post of Officer Superintendent.

Therefore, it is held that the petitioenr is entitled for payment of pension for the post of Head Clerk and not for the post of Office Superintendent. It is made clear that the State Government shall clear all the pensionary benefits including the GPF etc. treating the petitioner to have retired from the post of Head Clerk.

Learned counsel for the petitioner citied two instances and both the instances were also quoted before the Tribunal who were similarly situated and have been granted pension retiring form the post of Office Superintendent namely Shri S.P. Ghildiyal and Shri Zahid Hussain. It is settled law that if an action is done by mistake or by error of law or to favour some one, the same cannot be a ground to invoke Article 14 of the Constitution of India. Therefore, the argument of the learned counsel for the petitioner is rejected.

For the reasons recorded above, the writ petition is devoid of any merits. Accordingly, the writ petition is dismissed. No order as to costs.

(M.M. Ghildiyal, J.) **(P.C. Verma, A.C.J.)**

Dt. 13.04.2004.
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